

ORIGINAL

ALAIN C. BALMANNO – 3985
Assistant Utah Attorney General
160 East 300 South, Sixth Floor
P. O. Box 140856
Salt Lake City, UT 84114-0856
Telephone: (801) 366-0100
Facsimile: (801) 366-0101

FILED
20 FEB 04 PM 3:20

DISTRICT OF UTAH

BY: _____

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

MELVIN EUGENE SMITH,

Plaintiff,

v.

RICHARD McGARDEN, M.D., KENNON
TUBBS, M.D., JOHN DOES 1-10, UTAH
STATE PRISON,

Defendants.

**DEFENDANTS MOTION FOR
SUMMARY JUDGMENT AND
QUALIFIED IMMUNITY**

Case No. 2:03 CV 00566DAK

Judge: Dale A Kimball

Magistrate Judge: David Nuffer

Defendants Richard M. Garden and Kenneth G. Tubbs, through counsel, Alain C. Balmanno, Assistant Utah State Attorney, submit this Motion for Summary Judgment and qualified immunity.

To prove a violation of the Eighth Amendment for failure to provide medical care a prisoner must prove acts or omissions sufficiently harmful to evidence deliberate indifference to

23


serious medical needs. *Olson v. Stotts*, 9 F.3d 1475, 1477 (10th Cir. 1993). Plaintiff is unable to meet his burden because defendants have not been indifferent to plaintiff's medical needs.

Summary judgment is appropriate under Rule 56 (c) against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

Moreover, defendants are entitled to qualified immunity because defendants' actions did not violate a constitutional right. *Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir. 1996); *Wilson v. Meeks*, 52 F.3d 1547, 1552 (10th Cir. 1995).

For the reasons more fully developed in the supporting *Memorandum*, plaintiff's *Complaint* should be dismissed with prejudice.

DATED this 20th day of February, 2004.


Alan C. Balmanno
Assistant Attorney General
Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing **DEFENDANTS MOTION FOR SUMMARY JUDGMENT AND QUALIFIED IMMUNITY** was served by U.S. mail this

20th day of February 2004, to the following:

Melvin Eugene Smith
Inmate #21101
Utah State Prison
P. O. Box 250
Draper, UT 84020

Corina Archuleta